Supreme Court, U.S.
FILED
MAR 2 1994

No. 93-1232

In the Supreme Court of the United States

OCTOBER TERM, 1993

KONRADS KALEJS, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether it was reversible error for the immigration judge to admit into evidence depositions taken in the former Soviet Union.

2. Whether alleged interference by Soviet authorities with petitioner's defense justifies reversal of the order of deportation.

3. Whether the evidence is sufficient to support the findings of the Board of Immigration Appeals.

4. Whether the order of deportation should be overturned on the basis of evidence petitioner contends has been newly discovered, which the Board has not yet considered.

5. Whether the failure of the government to provide petitioner materials not in its possession justifies reversal of the order of deportation.

6. Whether petitioner's participation in persecution was sufficient to justify deportation pursuant to 8 U.S.C. 1251(a)(19) (1988) (current version at 8 U.S.C. 1251(a)(4)(D) (Supp. IV 1992).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-101) is reported at 10 F.3d 441. The opinion of the Board of Immigration Appeals (Pet. App. 193-393) is unreported. The opinion of the immigration judge (Pet. App. 102-192) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1993. A petition for rehearing was denied on December 30, 1993. Pet. App. 396-397. The petition for a writ of certiorari was filed on January 31, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a challenge to an order that petitioner, an Australian citizen, be deported to Australia. Pet. App. 2-4, 195. An immigration judge found petitioner deportable under 8 U.S.C. 1251(a)(1), (2), and (19) (1988), as an alien who was excludable at entry, entered unlawfully, and assisted in Nazi persecution.[1] The Board of Immigration Appeals dismissed petitioner's appeal (Pet. App. 193-393), and the court of appeals denied petitioner's petition for review (*id.* at 1-101).

1. Petitioner was born in Latvia in 1913.[2] He was educated as a soldier and served as an officer in the Latvian military between the two World Wars. When the Soviet Union entered Latvia in 1940, petitioner initially joined its army, but he deserted when the Germans took control of Latvia a year later. At that time, petitioner joined a commando unit led by Viktors Arajs, which, among other things, assisted the German forces in the extirpation of Gypsies and Jewish individuals in Latvia and neighboring countries. Petitioner was a company commander in the Arajs Kommando and reported directly to Arajs; petitioner controlled about one hundred men. In addition to

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[1] The grounds for deportation were reorganized by Section 602(a) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5077, and the provisions cited in the text now appear as 8 U.S.C. 1251(a)(1)(A), (1)(B), and (4)(D) (Supp. IV 1992). The reorganized grounds for deportation do not apply to this case because the 1990 Act states that the amendments set forth in Section 602 "shall not apply to deportation proceedings for which notice has been provided to the alien before March 1, 1991." § 602(d), 104 Stat. 5082.

[2] Our statement of the factual background in this paragraph summarizes the majority opinion of the court of appeals. See Pet. App. 2-3, 5-9.

other activities, a portion of the Arajs Kommando under petitioner's leadership served as guards at the Salaspils concentration camp. After World War II, petitioner fled to Australia, where he became a citizen. In 1959, he entered the United States, stating that he had been a farm laborer during the war.

2. In 1988, the INS served petitioner with an order to show cause,[3] charging that he is deportable under 8 U.S.C. 1251(a)(1), (2), and (19) (1988). Respectively, those provisions cover aliens who were excludable at entry, entered unlawfully, and assisted in Nazi persecution. After extensive hearings, and the introduction of considerable documentary evidence, the immigration judge (IJ) issued a lengthy opinion explaining his conclusion that petitioner is deportable under those statutory provisions. Pet. App. 102-192.

The IJ's opinion included a detailed summary of the evidence introduced into the record. Pet. App. 114-161. Dr. Raul Hilberg, a professor at the University of Vermont, furnished expert testimony regarding the nature of the activities carried out during World War II by the Arajs Kommando. *Id.* at 115-120. Also, the record included a number of original documents created during the war indicating that petitioner served in that unit in the manner described above. For example, Exhibit 23 is a November 1941 certificate signed by Arajs, which states that petitioner had become a member of his unit in July of 1941; Exhibit 25 is a November 1942 certificate signed by a responsible officer in the Arajs Kommando stating that pe-

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[3] The government initially issued an order to show cause in October of 1984, but petitioner fled to Canada and Australia. Petitioner subsequently returned to this country and attempted to assume a new identity, but he was arrested in Florida in April 1985. Pet. App. 2-3, 107.

titioner had been serving in that unit since July 1941, and that he had been on duty at the eastern front from February until April of 1942; and Exhibit 45 is a May 1943 note signed by petitioner stating that he was a company commander in the Arajs Kommando. *Id.* at 172, 181-182, 188-189.

Those documents and Dr. Hilberg's testimony were corroborated by testimony and depositions of individuals who had served in petitioner's unit or been imprisoned in the Salaspils concentration camp. Pet. App. 120-155. Before considering the depositions, which were taken in then-Soviet Latvia with a Latvian prosecutor as presiding officer, the judge explained that he had "viewed the results," and that he "f[ou]nd these depositions admissible as probative and not inherently untrustworthy." *Id.* at 114.

After a detailed examination of the evidence, the judge concluded that petitioner was deportable under 8 U.S.C. 1251(a)(19) as an individual who had assisted or otherwise participated in Nazi persecution. Pet. App. 166-190. That conclusion rested on, *inter alia*, the judge's factual findings that the Arajs Kommando assisted the Nazis in persecuting individuals on the basis of their race (*id.* at 169-170); that petitioner was a member of that unit during 1941, 1942, and 1943 (*id.* at 171-174); and that petitioner assisted in racial persecution during his service on the eastern front in 1942 (*id.* at 178-183), as the company commander of a guard unit that executed a band of 20-30 Gypsies in Porkhov in 1943 (*id.* at 184-187), and as the company commander of the armed exterior guard unit at the Salaspils concentration camp in 1942 and 1943 (*id.* at 187-189). At various points, the immigration judge

specifically rejected petitioner's testimony as unworthy of credence.[4]

The immigration judge also found petitioner deportable under 8 U.S.C. 1251(a)(1) and (2), based on the acknowledged fact that petitioner did not disclose the foregoing activities when he applied for a visa to immigrate to the United States. Pet. App. 190-192. The judge noted a 1984 deposition in which petitioner acknowledged that he did not "disclose his service during the war because he believed the true facts might disqualify him from obtaining his visa." *Id.* at 191. Because the IJ concluded that the misstatement "was a wilful and material misrepresentation," he concluded that petitioner was deportable as an alien who was excludable at entry (Section 1251(a)(1)) and as an alien who entered unlawfully (Section 1251(a)(2)). Pet. App. 192 (citing *Kungys* v. *United States*, 485 U.S. 759 (1988)).

3. The Board of Immigration Appeals dismissed petitioner's appeal. Pet. App. 193-393. Like the immigration judge, the Board started with a careful review of the evidence in the record. *Id.* at 201-253.

a. On the merits, the Board first rejected petitioner's claim that the immigration judge erred in admitting videotaped depositions taken in the Soviet Union. Pet. App. 253-312. The Board abjured petitioner's request that it adopt a "per se rule of inadmissibility for Soviet deposition testimony," *id.* at 265, concluding "that the

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[4] See, *e.g.*, Pet. App. 172-174 (characterizing as "self-serving" petitioner's claim that Exhibits 23 and 25 were "false and were obtained by him from friends so that he could enter the university"); *id.* at 179 (rejecting as "insufficient to rebut the convincing evidence presented by the government" petitioner's claim that prisoners taken on the eastern front were handed over to the Germans rather than executed).

most prudent approach to this question of the reliability of Soviet deposition testimony is to examine carefully the particular circumstances surrounding the depositions before determining the weight to be given the deposition testimony." *Id.* at 266. The Board identified six factors that should be analyzed:

> evidence of Soviet political interest in a case; restrictions, if any, placed on cross-examination during the depositions; the availability of the deposition witnesses' prior statements; the degree of interference or impropriety on the part of the Soviet procurator during the depositions; the accuracy of the translation of the testimony of the deposition witnesses; the extent of corroborative evidence available to substantiate the deposition testimony; and any other factors which may be indicative of the reliability of the deposition testimony.

Id. at 267.

The Board then conducted a review under that standard of the deposition testimony introduced at petitioner's deportation hearing. Pet. App. 268-287. After reviewing the relevant factors, the Board found "no error in the immigration judge's decision to accord weight to the testimony of the Soviet deponents." *Id.* at 268. The Board explained that there was no evidence in the record regarding Soviet political interest in his case (*id.* at 268-270), that petitioner's counsel, who was present at the depositions, had an adequate opportunity for cross-examination (*id.* at 270-281), that the procurator was not partial against petitioner and did not interfere improperly in the deposition process (*id.* at 281-285), that the depositions were translated reliably (*id.* at 285-286), and that there was considerable evidence corroborating the evidence provided by the depositions (*id.* at 287).

The Board also rejected a number of specific challenges petitioner raised to introduction of the depositions. For example, the Board rejected petitioner's argument that his right to cross-examine the deponents was infringed by the government's failure to produce all prior statements of the witnesses before the depositions were taken. Pet. App. 273-281. The Board noted that the government complied to the extent possible with an order of the immigration judge requiring it to make prior written statements available 60 days before the depositions, pointing out that there was "no indication in the record that [the government had not] made available to [petitioner] all protocols [*i.e.*, statements] which it received from Soviet authorities." *Id.* at 273-275. The Board also relied on the absence of any "claim that the Government withheld any protocols which may have been favorable to [petitioner]'s defense." *Id.* at 279. Accordingly, the Board rejected petitioner's objection that he could not cross-examine witnesses adequately because certain additional statements mentioned in their testimony had not been provided to him. *Id.* at 279-281. The Board further found "no basis in the record to conclude that the earlier protocols now exist, or that, assuming they do exist, their production would have assisted [petitioner] in his cross-examination * * * in any meaningful manner." *Id.* at 278. It explained that the statements in question generally resulted from interrogations made shortly after the war or in the 1950s, and that it was not clear that petitioner was discussed in the statements. *Id.* at 278-279.

The Board likewise rejected petitioner's claim that the Soviet witnesses should have been deposed in the United States. Pet. App. 287-289. The Board affirmed the immigration judge's finding that the Soviet witnesses were not available to testify at the deportation hearing, ex-

plaining that "[t]here is no indication in the record that the reasons offered by these witnesses for their inability to travel abroad were illegitimate." *Id.* at 288.

Finally, the Board rejected petitioner's claim that he was deprived of a fair hearing because his counsel was not allowed to visit the Soviet archives and the sites of the persecution in Russia. The Board stated that petitioner's arguments rested on the Federal Rules of Civil Procedure, which are inapplicable in deportation proceedings, and that, in any event, petitioner "has not demonstrated how such visits would appreciably have bolstered his preparation of a defense." Pet. App. 291-293.

b. The Board then turned to petitioner's challenge to the immigration judge's finding that he is deportable under 8 U.S.C. 1251(a)(19). Pet. App. 312-350. The Board rejected petitioner's claim that the immigration judge erred in finding petitioner's account of his war-time activities unworthy of credence. *Id.* at 316-320. Although the Board concluded that the government had failed to show by clear and convincing evidence that petitioner assisted in persecution in connection with certain incidents during the period in 1942 when he served on the eastern front (*id.* at 322-327), the Board affirmed the immigration judge's findings that petitioner had assisted in persecution during his service at Porkhov and elsewhere on the eastern front in 1943 (*id.* at 327-334) as well as at the Salaspils concentration camp (*id.* at 334-341). The Board also accepted the government's argument (which the immigration judge had rejected) that petitioner's service in the Arajs Kommando from July 1941 to January 1942 included sufficient assistance in persecution to justify deportation on that basis. *Id.* at 341-345.

c. The Board rejected petitioner's challenge to the immigration judge's conclusion that he is deportable un-

der 8 U.S.C. 1251(a)(1) and (2) based on willful misrepresentations made at the time of his entry. Pet. App. 350-392. Applying the analysis articulated by this Court in *Kungys* v. *United States*, 485 U.S. 759 (1988), the Board reasoned that petitioner's misstatement that he was a farm laborer from 1941 to 1944 was willful, relying on petitioner's later admission that he did not disclose his war-time activities because he thought the truth would bar him from coming to this country. Pet. App. 374-375. The Board also reasoned that the misrepresentation was material, in light of testimony by consular officials that, had petitioner articulated the true facts, they would have inquired further and probably have denied petitioner entry to this country. *Id.* at 375-378, 381. The Board rejected petitioner's contention that he properly could have described his occupation from 1941 to 1944 as "farm laborer," noting that petitioner obviously understood the request for information about his "occupation" to refer to military service, given his statement on the visa application that he was in the military from 1929 to 1941. *Id.* at 386-387.

4. The court of appeals sustained the Board's decision and therefore dismissed petitioner's petition for review. Pet. App. 1-101.

a. After summarizing the evidence presented at the deportation hearing (Pet. App. 5-9), the court explained that under applicable precedent in the Seventh Circuit, an individual is deportable under 8 U.S.C. 1251(a)(19) even if the government did not prove that he was personally responsible for a specified atrocity, if the government established that the person's role in the war justified an inference that he assisted in persecution. Pet. App. 11-12. The court noted, moreover, that the charges against petitioner, "if true, undoubtedly qualify as assistance in persecution." *Id.* at 13. After discussing peti-

tioner's explanation of his activities during the war, the court stated that "[t]he immigration judge and the [Board] did not believe [petitioner's] denials and neither do we." *Id.* at 17. Among other things, the court noted that it found it "incredible that [as petitioner claimed] the Germans would have continued to pay the military salary of a Latvian soldier for two-and-a-half years while he was recuperating from an ulcer, studying and laboring on a farm." *Ibid.* Accordingly, the court held that "the BIA was amply justified" in concluding that petitioner is deportable under 8 U.S.C. 1251(a)(19) based on his assistance in Nazi persecution. Pet. App. 18.

b. The court likewise affirmed the Board's conclusion that petitioner is deportable by virtue of material misrepresentations he made on immigration forms at the time he entered the United States. Pet. App. 19-27. The court noted petitioner's statement on those forms that he was a farm laborer from 1941 to 1944, as well as petitioner's concession that "this information was false or at least incomplete." *Id.* at 19. The court then rejected petitioner's "extraordinary argument that there was not space on the form to give an accurate description." *Ibid.* It explained:

> Even [petitioner] admits that he received a military salary throughout the war; he could have said "soldier" or "military" or "army" in as little space as "farm laborer." And given our conclusion that [petitioner] was actually an officer in a brutal pro-Nazi military unit, the description "farm laborer" was not even a partially accurate description of [petitioner's] activities during the war. The real reason [petitioner] decided to lie, of course, was not an absence of space on the visa application—after all, [petitioner] also had a personal interview with Amer-

> ican consular officials during which he could have given a more expansive and accurate representation of his war years—but the fear that he would not be allowed to enter the United States if his true involvement were known.

Id. at 19-20.

To consider whether the Board properly concluded that those facts justified a finding of deportability, the court applied the test articulated by this Court in *Kungys* v. *United States*, 485 U.S. 759 (1988). The court found no doubt that petitioner had made a willful misrepresentation; petitioner "admitted as much." Pet. App. 21. The court then concluded that the misrepresentation was material, explaining that State Department policy at the time petitioner entered would have required careful exploration of the war-time activities of any German collaborator, and would have led to denial of a visa to any individual "with serious involvement in Nazi activity." *Id.* at 25-26. Because true statements by petitioner "would certainly have prompted further inquiry," the statements were material. *Id.* at 26.

c. In a portion joined only by Judge Cummings, the court's lead opinion rejected petitioner's challenge to the admission of evidence at his deportation hearing. Pet. App. 27-32. It first "reject[ed] out of hand the overarching argument that any evidence flowing from the Soviets is fundamentally flawed." *Id.* at 28. The opinion then noted that petitioner "has not pointed to any reason why the Soviets would want to implicate him personally, or demonstrated any unusual interest in his case by Soviet authorities," and it referred to the corroboration of the Soviet evidence by "Western documentation, plus reliable eyewitness testimony subject to vigorous cross-examination." *Id.* at 28-29.

The lead opinion also rejected petitioner's numerous challenges to the procedures under which the Soviet depositions were held. Pet. App. 29-31. It noted that "there is no general right to discovery in a deportation hearing so long as the accused had reasonable opportunity for cross-examination, as there was here," but acknowledged that "the stakes of deportation hearings are great in terms of reputations and disruptions to lives, and we must ensure that such proceedings do not turn into kangaroo courts." *Id.* at 30. The opinion concluded, however, that "the hearings in this case were conducted with eminent fairness to [petitioner]." *Id.* at 30-31.

Finally, the lead opinion rejected petitioner's due process claims concerning the depositions as "patently ridiculous." Pet. App. 31. The court explained:

> The depositions were taken in the Soviet Union because the witnesses were too old and frail to travel to the United States. [Petitioner] did not attend because he did not ask to attend, and so waived that issue even if it had merit. The government actually did turn over to [petitioner's] counsel all witness statements it had in its possession; those witnesses for whom the United States did not have previous statements were by and large witnesses called by [petitioner] himself to corroborate his case. As noted, there is no general right to discovery in a deportation hearing, but there is certainly no right to discovery of documents that the government does not have in its possession and is unable to obtain.

Id. at 31-32.

d. Judge Manion concurred, but issued a separate opinion. Pet. App. 32-34. He accepted petitioner's argument that the Soviet deposition testimony should not

have been admitted, but concluded that "the untainted evidence supports the Board's decision." *Id.* at 33.

e. Senior District Judge Eisele dissented. Pet. App. 34-101. He reviewed the evidence in the record with considerable skepticism (*id.* at 43-73), and accepted petitioner's argument that the immigration judge should not have admitted the Soviet deposition testimony (*id.* at 73-80), because, in his view, petitioner encountered difficulties in connection with those depositions that deprived him of a "reasonable opportunity to present evidence on his own behalf" (*id.* at 81). Finally, Judge Eisele concluded that the record "does not contain enough substantial competent evidence to meet the clear and convincing standard." *Id.* at 98.

ARGUMENT

1. Petitioner's principal contention (Pet. 20-37) is that it was improper for the immigration judge (IJ), affirmed by the Board, to admit the Soviet deposition testimony into evidence at his deportation hearing. That claim is incorrect and, in any event, does not merit review.

Under 8 U.S.C. 1252(b), the Attorney General has broad discretion to devise the procedures under which a determination of deportability shall be made. Section 1252(b) contains a number of specific requirements, including that the alien "shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government." 8 U.S.C. 1252(b)(3). The procedures provided by the Attorney General in this case satisfied the statutory mandate, which in turn should satisfy any applicable constitutional requirements. In accordance with the modern trend toward broad admission of evidence, coupled with evaluation of the weight of

the evidence in light of any concerns about its accuracy, the Board properly rejected petitioner's proposal of a per se rule that would render Soviet deposition testimony inadmissible in all cases. Instead, the Board adopted a six-factor test under which the evidence is not admissible if the alien raises serious concerns regarding its reliability.

The Board carefully applied that test in this case. As we have discussed above (see pages 6-8, *supra*), the Board devoted twenty pages of its opinion to consideration of the various factors under its test, including in that consideration detailed analysis of petitioner's specific complaints regarding the circumstances of this particular case. Based on its analysis, the Board concluded that the evidence properly was admitted, generally because petitioner's objections did not establish that the evidence introduced in his case lacks substantial probative force. Pet. App. 268-287.

To the extent petitioner challenges the Board's consideration of the various factors and his specific challenges, he raises a fact-bound claim not warranting review by this Court. To the extent petitioner criticizes the legal rule adopted by the Board—that Soviet deposition testimony is admissible at immigration hearings if it satisfies the Board's six-factor test—he cannot suggest that any court of appeals has ruled that the Board must apply the blanket rule of exclusion he seeks. Because the Board adopted and applied the challenged test for the first time in this case, the Board decision to which petitioner objects is the only one in which the issue has yet arisen. Moreover, the decision below presumably does not establish the validity even in the Seventh Circuit of the Board's approach to the admission of deposition testimony taken in the former Soviet Union, because only one of the two judges who joined in

sustaining the deportation order voted to uphold the Board's approach on the deposition issue. Judge Manion believed that the evidence should have been excluded, but voted to sustain the Board's order because he found the Board's order to be supported by sufficient independent evidence. Pet. App. 32-34. Nor can petitioner claim that any of the other courts of appeals would have required exclusion of the deposition testimony on the facts of this case.[5]

Given the fact-specific nature of the Board's approach, it would be decidedly premature for the Court to review that approach without allowing the Board an opportunity to apply its test in other cases, and without awaiting consideration of the test by other courts of appeals and even by another panel of the Seventh Circuit.

2. Petitioner also contends (Pet. 37-40) that the order of deportation should be set aside because the actions of Soviet authorities impermissibly interfered with his opportunity to present a defense. Although he has made broader claims at other stages of the proceedings, his claim on this point in the certiorari petition appears to be limited to the contention that additional research in records controlled by the Soviet Union would have revealed new witnesses or prior statements of the witnesses presented by the government, and that those revelations would have changed the result of his deportation

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[5] Petitioner's statement that "[t]he Seventh Circuit stands alone in [its treatment of Soviet deposition testimony]" (Pet. 37) does not rest on any holding by any court that Soviet deposition testimony automatically should be excluded—either in district court proceedings governed by the Federal Rules of Evidence or in immigration hearings governed by the standards established under 8 U.S.C. 1252(b)—absent some particularized concern about its probative value. As petitioner's own discussion makes clear (Pet. 28-37), such testimony has been admitted in a number of other cases.

proceeding. Among the problems with that contention is petitioner's failure to did not articulate before the Board the relevance of any specific item of evidence that he would have presented. See Pet. App. 278-279, 291-293 (Board's discussion of petitioner's failure to explain how evidence would be probative). Hence, petitioner's argument rests on little more than speculation about what would have happened if he had visited the Soviet archives. Given the findings of the court of appeals (*id.* at 31-32) and the Board (*id.* at 277-279) that the United States government delivered all evidence within its control, that speculation furnishes no basis for overturning the decision of the Board. Compare *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 867-871 (1982). Petitioner does not identify any decision of any court accepting such an argument, and his claim therefore does not warrant review by this Court.

3. Petitioner also contends (Pet. 40-47) that—putting to one side the Soviet deposition testimony—the evidence was insufficient to support an order of deportation. That claim is relevant, however, only if the Court were first to determine that the Board erred in upholding the immigration judge's decision to admit the Soviet deposition evidence in this case. Accordingly, it does not provide an independent basis for review of the decision of the court of appeals.[6] Moreover, as Judge Manion concluded in his concurring opinion below, there is

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[6] Although only one judge below relied on the deposition testimony to sustain the Board's order, the government would be entitled to defend the judgment below (and the Board's decision) on the ground that the deposition testimony was properly admitted. Only if the Court rejected the government's position on that issue would the question of the sufficiency of the remaining evidence arise.

sufficient evidence to support the order of deportation even without the deposition evidence, see Pet. App. 32-34,[7] and that fact-bound claim does not in any event warrant review by this Court.

4. Petitioner argues at length (Pet. 47-54) that the Court should grant review to consider evidence that he contends has been newly discovered, even though—as he acknowledges (Pet. 48)—that evidence was not "part of the record of the immigration hearings." That claim is without merit. The proceeding before the court of appeals was brought pursuant to 8 U.S.C. 1105a to review a

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[7] Perhaps the clearest finding of persecution that is independent of Soviet deposition testimony is the finding related to petitioner's service in the Arajs Kommando from July 1941 to January 1942. The Board's conclusion that petitioner's service during that period involved persecution (Pet. App. 341-345) rests almost exclusively on the testimony of Dr. Hilberg regarding the operations of the Arajs Kommando during that period, which the court of appeals characterized as "unrebutted," *id.* at 341, together with documentary evidence that established the nature of the Kommando's operations during that period, as well as petitioner's role in those operations.

Furthermore, the Soviet deposition testimony was not necessary to the charges that petitioner made material misrepresentations at the time of his entry. Accordingly, petitioner's deportability under 8 U.S.C. 1251(a)(1) and (2) would not be affected by the absence of the Soviet deposition testimony. The finding of deportability under 8 U.S.C. 1251(a)(19) (or its current analogue at 8 U.S.C. 1251(a)(4)(D)) renders petitioner ineligible for various forms of discretionary relief available from the Attorney General, including, among other things, suspension of deportation under 8 U.S.C. 1254(a) (1988 & Supp. IV 1992). The analogous ground of exclusion (8 U.S.C. 1182(a)(33) (1988) (recodified at 8 U.S.C. 1182(a)(3)(E) (Supp. IV 1992)) would render petitioner ineligible for discretionary relief under 8 U.S.C. 1182(c). The findings of deportability under 8 U.S.C. 1251(a)(1) and (2), by contrast, do not render petitioner ineligible for discretionary relief.

final order of deportation issued by the Board. Under 8 U.S.C. 1105a(a)(4), the court must dispose of a petition for review "solely upon the administrative record upon which the deportation order is based." The proper procedural avenue to obtain consideration of any newly discovered evidence is by means of a motion to reopen before the Board. See 8 C.F.R. 3.8; *INS* v. *Doherty*, 112 S. Ct. 719, 724-725 (1992). Petitioner states (Pet. 48) that he has presented "[e]ssentially the same material" to the Board in a pending motion to reopen.[8] Accordingly, there is no basis for action by this Court to examine the proffered evidence at this stage of the proceedings.

5. Petitioner argues (Pet. 54-58) that the order of deportation should be set aside because of a violation of the principles of *Brady* v. *Maryland*, 373 U.S. 83 (1963), in the proceedings leading up to his deportation hearing. Setting to one side the fact that *Brady* applies only in criminal cases and that a deportation hearing is not a criminal proceeding,[9] it is clear that petitioner would not be entitled to relief even if the principles of *Brady* did apply here. As the court of appeals explained, the "government actually did turn over to [petitioner's] counsel all witness statements it had in its possession"; petitioner's claims relate solely to documents the gov-

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[8] The Office of Special Investigations in the Criminal Division has informed us that petitioner filed a motion to reopen on November 19, 1993, and that briefing on the motion was completed on December 23, 1993.

[9] Whatever the merits of the Sixth Circuit's belief in *Demjanjuk* v. *Petrovsky*, 10 F.3d 338, 353 (1993), that *Brady* should apply in denaturalization and extradition proceedings (see Pet. 57), that court did not refer to deportation proceedings. Accordingly, it is not at all clear that the Sixth Circuit would apply *Brady* in a case, like this one, involving deportation of an individual who has never been a United States citizen.

ernment "d[id] not have in its possession and [wa]s unable to obtain." Pet. App. 31-32. Neither *Brady* nor any other discovery rule could justify overturning an order of deportation based upon the failure to deliver such documents. See, *e.g.*, *United States* v. *Molt*, 772 F.2d 366, 371 (7th Cir. 1985) (materials in possession of cooperating *state* agency not covered by Jencks Act, 18 U.S.C. 3500), cert. denied, 475 U.S. 1081 (1986); *United States* v. *Hutcher*, 622 F.2d 1083, 1088 (2d Cir.) (materials in possession of bankruptcy court not covered by *Brady* or Jencks Act), cert. denied, 449 U.S. 875 (1980); *United States* v. *Friedman*, 593 F.2d 109, 119-120 (9th Cir. 1979) (diary of drug co-conspirator seized by Chilean government not producible under Fed. R. Crim. P. 16, *Brady*, or Jencks Act).

6. Finally, petitioner argues (Pet. 58-65) that the Seventh Circuit has adopted too lenient a standard of proof of participation in Nazi persecution and that the Seventh Circuit's standard would not be adequate to justify deportation in the Ninth and Sixth Circuits. That claim regarding the appropriate standard of proof, however, was not presented to the Board or to the court of appeals and thus is not properly before this Court. See, *e.g.*, *Zobrest* v. *Catalina Foot-hills School District*, 113 S. Ct. 2462, 2466 (1993). Moreover, for the reasons stated in our brief in opposition to the certiorari petition in *Kairys* v. *INS*, cert. denied, 113 S. Ct. 1832 (1993) (No. 92-7982) (a copy of which we have provided to counsel for petitioner), petitioner errs in contending that there is a square circuit conflict on that question.

In any event, it seems quite unlikely—accepting the factual findings of the IJ and the Board—that any court would have found petitioner's conduct insufficient to justify deportation. As discussed above, those findings included, among other things, the conclusion that he per-

sonally commanded a group of soldiers who slaughtered a group of 20-30 Gypsies in Porkhov. See Pet. App. 184-187 (findings of immigration judge), 327-334 (Board's affirmance of findings). Those findings should justify deportation under any court's construction of 8 U.S.C. 1251(a)(19). Compare *Laipenieks* v. *INS*, 750 F.2d 1427, 1431 (9th Cir. 1985) (stating that "[m]ere acquiescence and membership in an organization [were] insufficient"); *United States* v. *Sprogis*, 763 F.2d 115, 121-122 (9th Cir. 1985) (stating that "ministerial acts" and "passive accommodation" were insufficient); *Petkiewytsch* v. *INS*, 945 F.2d 871 (6th Cir. 1991) (holding that an alien who involuntarily served as a civilian guard at a labor education camp, was once imprisoned for failing to perform his duties diligently, and was exonerated by British authorities in a post-war investigation was not deportable under 8 U.S.C. 1251(a)(19)).

The Court denied review last term in *Kairys*, in which the petitioner likewise sought review of a Seventh Circuit decision and asserted a conflict with decisions of the Sixth and Ninth Circuits. There is no reason for a different disposition here, especially because petitioner did not raise the issue below and the evidence established that he played an active role as a guard commander and a "key officer" (Pet. App. A12) of a unit that engaged in widespread persecution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1994